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No. 75-1282

In the Supreme Court of the United States

OCTOBER TERM, 1975

GREGORY Y. LAU, PETITIONER

v.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 524 F.2d 1405. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1975. A petition for rehearing was denied on November 25, 1975. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including March 9, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien visitor, admittedly deportable, was improperly denied discretionary relief from deportation.

STATEMENT

Petitioner is a native and citizen of Hong Kong, and was admitted to the United States on a non-immigrant student visa on August 23, 1969 (R. 11, 18).[1] His visa, which had been renewed on several occasions, finally expired on June 23, 1974. Petitioner remained in the United States beyond the authorized period, however, and deportation proceedings were consequently initiated. Following a hearing on October 24, 1974, at which petitioner conceded his deportability (R. 18), he was found to be deportable but was granted the privilege of voluntary departure on or before December 31, 1974 (R. 13).[2]

On November 14, 1974, petitioner filed, pursuant to 8 U.S.C. 1153(a)(3), a petition seeking priority status for the issuance of an immigrant visa on the basis of his occupation (R. 22-34).[3] He attached to that petition documents indicating that, following receipt of his undergraduate degree, he had completed a one-month course in respiratory therapy at the University of Chicago and had been employed full-time during the preceding year as a respiratory therapist (*e.g.*, R. 29A).

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[1]"R." refers to the administrative record. "Tr." refers to the transcript of proceedings in the district court.

[2]Petitioner waived his right to appeal the immigration judge's finding of his deportability (R. 14).

[3]8 U.S.C. 1153 provides for the granting of immigrant visas to nine separate categories of aliens and allocates the available visas among those categories on a priority basis. Petitioner sought to be classified within the third preference category, which is limited "to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States." 8 U.S.C. 1153(a)(3).

On December 23, 1974, petitioner requested a six-month extension of the period of his voluntary departure from the United States (R. 38-39). The Immigration and Naturalization Service granted this request in part, advising petitioner by letter dated December 26, 1974, that he could remain in this country until January 31, 1975, but that the period of his voluntary departure would not be extended further (R. 40). The Service also informed petitioner's counsel, by letter dated January 8, 1975, that the period of petitioner's voluntary departure had been extended to January 31, 1975, and that his application for priority status filed on November 14, 1974—even if approved—would not permit him to remain in the United States past that date. The Service explained in its letter of January 8 that (R. 41-42)—

> if the petition * * * for third preference classification was approved, [petitioner] would not be considered for immediate immigrant visa issuance as visa allotments under the third preference category * * * are unavailable. It is our further understanding that there has been no visa allotments under this third preference category for natives of Hong Kong since 1966. Furthermore, there is no authority under current regulations to allow [petitioner] to remain in the United States for an indefinite time to await an immigrant visa on the basis of an approved petition.[4]

On January 20, 1975, petitioner informed the Service's District Director that he had completed arrangements to leave the United States (R. 46-47). He also requested

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[4]On January 16, 1975, the Service received notice of the United States Department of Labor's determination that petitioner's qualifications were insufficient to entitle him to the priority classification he had requested (R. 44).

further consideration of his case by the Service (R. 47). The Service advised petitioner in response that he had previously been found to be deportable and that the period of his voluntary departure, as extended, would expire on January 31, 1975 (R. 48).

On January 30, 1975, petitioner filed suit in the United States District Court for the Southern District of Ohio seeking an injunction against his deportation, a postponement of the scheduled date of his voluntary departure and an order requiring the Immigration and Naturalization Service to act upon his request for an extension of his temporary visa.[5] Although not contesting his deportability, petitioner alleged that denial of his requests for discretionary relief had been arbitrary and capricious. He also sought an order temporarily restraining his deportation pending a hearing in the district court on the merits of his complaint, which the district court granted on January 30, 1975. Following an evidentiary hearing on February 14, 1975, the district court denied petitioner's requests for relief (Pet. App. B). The court of appeals affirmed (Pet. App. A).[6]

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[5]Petitioner alleged in his complaint that he had applied in May of 1974 for an extension of his temporary visa and that such application had been submitted to the Service "a substantial time before the then-existing extension was to expire." In fact, however, the application itself reflects that petitioner had not signed the application until June 19, 1974, and that it had not been received by the Service until July 5, 1974—almost two weeks after his visa had expired (R. 1-2). During the hearing in the district court, petitioner explained that after he had signed the application he had taken it to his college advisor to have it completed (Tr. 57). His college advisor completed the application on June 27, 1974—four days after his visa had expired (R. 2).

[6]On December 30, 1975, Mr. Justice Stewart granted petitioner's request for a stay of the court of appeals' mandate pending the completion of proceedings in this Court (see Pet. 9).

ARGUMENT

Petitioner did not disavow during proceedings before the courts below the concession he made at his deportation hearing that he is presently in this country illegally and is therefore deportable. Neither has he contended before this Court that the finding of his deportability was erroneous or otherwise contrary to law. His contentions relate instead to alleged procedural defects in the Service's disposition of his requests for discretionary relief. But those defects, if any, would not entitle him to relief from deportation or make his presence here legal. In any event, any procedural defects in the denial of his requests for discretionary relief have been cured during this litigation and further review by this Court is therefore not warranted.

1. Petitioner's contention that his application for an extension of his temporary visa was denied without notice to him or a statement of reasons, in violation of applicable regulations (see 8 C.F.R. 214.2 (f)(7)) and his right to procedural due process, is refuted by the record. As stated above (see note 5, *supra*), petitioner did not seek an extension of his temporary student visa until July 5, 1974—almost two weeks after the period of his lawful residency had expired. The Service denied petitioner's request for an extension of his temporary visa on August 21, 1974 (R. 2). On August 26, 1974, the Service informed petitioner by letter that an order requiring him to show cause why he should not be deported had been issued and that a deportation hearing was scheduled for September 26, 1974 (R. 4). The first paragraph of that letter referred to a recent interview involving petitioner and an officer of the Service. Although the record does not reveal the substance of that interview, petitioner's request for an extension of his temporary visa was the only matter

involving petitioner pending at that time—and it therefore appears reasonable to conclude that petitioner was advised during the interview of the fact of and the reasons for the denial of his request for an extension of his temporary visa.

Even if it is assumed, however, that petitioner was not advised during the interview of the denial of his request for an extension of his temporary visa, he could not have been unaware at the time of his deportation hearing that his visa request had been denied. Petitioner—who was represented by counsel—conceded his deportbility at the hearing on October 24, 1974, and requested the privilege of voluntary departure. Had he then believed that his application for an extension of his temporary visa was still pending, he presumably would have so informed the immigration judge. Petitioner's failure to object to his scheduled deportation on the basis of a pending request for an extension of his temporary visa confirms that he knew at that time that his visa request had been denied. If petitioner was dissatisifed with the reasons given him for the denial of his visa request, he should have brought that fact to the immigration judge's attention.

2. Petitioner also contends that the Service did not notify him, as required by 8 C.F.R. 204.1(c)(5), of the denial of his request for priority status for the issuance of an immigrant visa. But petitioner was informed in the course of this litigation that his request for priority classification had been denied and he was given a statement of reasons explaining the basis of that action (Tr. 12-13). Petitioner did not subsequently seek review of the

decision denying his request for priority classification,[7] and nothing that has occurred would prevent his applying to the United States consul in Hong Kong for priority classification after he has returned there. See 8 C.F.R. 204.1(c)(4). In any event, as the Service informed petitioner's attorney on January 8, 1975, petitioner's request for priority classification, even if approved, would not have permitted him to remain in the United States since no permanent visas were available for the visa category in which petitioner had sought to be classified.

3. Petitioner further contends that the Service failed to comply with applicable regulations by denying the request made by him on December 23, 1974, for an extension of the period of his voluntary departure without a statement of reasons. However, the Service granted petitioner a one-month extension of the period of his voluntary departure. The Service advised petitioner by letter of this extension, and informed him that the period of his voluntary departure would not be extended further (R. 40). The Service also advised petitioner's attorney by letter of the extension and that the petition for priority classification would not allow petitioner to remain in the United States beyond the period of his scheduled date of voluntary departure, as extended (R. 41-42). Petitioner was thus adequately advised both of the fact of and reasons for the partial granting of his December 23, 1974, request for an extension of the period of his

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[7]Petitioner could have requested review of the decision denying his request for priority classification at any time within ninety days of the decision. 29 C.F.R. 60.4(b).

departure.[8] Indeed, as the district court observed (Pet. App. 11a):

> In view of the expiration of his student visa and in view of the unavailability of other visa allotments for [petitioner], his application for a six-month delay of departure time was more in the nature of an attempt to circumvent the immigration laws than an application directed to the sound discretion of the district director.

4. Finally, petitioner contends that the Service wrongfully failed to act upon the request made by him on February 5, 1975, for a further extension of the period of his voluntary departure. Before he filed that request, however, the district court had granted his request for a preliminary injunction staying his deportation (Pet. App. 6a). Following entry of the district court's order dissolving that stay, petitioner's deportation was stayed by order of the court of appeals and, subsequently, by order of Mr. Justice Stewart. In these circumstances, the Service was not required to act upon petitioner's February 5, 1975, request for an extension of the period of his voluntary departure since any decision on that request will be meaningless until after proceedings have been concluded in this Court.

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[8]Contrary to petitioner's assertions, the applicable regulations do not require the Service to provide aliens with a statement of reasons supporting the denial of requests for a stay of deportation or for an extension of time within which voluntarily to depart from the United States. See 8 C.F.R. 243.4, 244.2.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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